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No. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF ST. PAUL AND ST. ANDREW,

Petitioner,

—v.—

KENT L. BARWICK, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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QUESTIONS PRESENTED

1. Does not the Free Exercise Clause of the First Amendment bar the application to a church of the New York City Landmarks Preservation Law where such application (a) subjects the Church to immediate, criminally enforceable governmental restrictions penalizing the failure of the Church to expend its funds for repair of its house of worship, (b) subjects the Church to immediate, criminally enforceable governmental restrictions preventing rebuilding of its house of worship as dictated by the Church's religious needs, and (c) subjects the Church's control of its house of worship to the discretionary authority of a government commission whose sole statutory standard for decisions respecting it is "the preservation of buildings of historic and aesthetic importance"—a standard which excludes any consideration of the Church's liberty to apply its property to its religious ends?

2. Does not application of the New York City Landmarks Preservation Law to the Church of St. Paul and St. Andrew constitute the taking of the Church's property for public use without just compensation in contravention of the Fifth Amendment as applied to the states through the Fourteenth Amendment?

LIST OF PARTIES

The parties in the proceedings below were:

Plaintiff (Petitioner here)

Church of St. Paul and St. Andrew*

Defendants (Respondents here)

Kent L. Barwick
William J. Conklin
Mary Childs Black
R. Michael Brown
Barbaralee Diamonstein
Thomas J. Evans
Aramina Ferrer
Charles A. Platt
Beverly Moss Spatt
Anthony M. Tung
Elliott Willensky
Constituting the Landmarks Preservation Commission of the City of New York

Edward I. Koch
Harrison J. Goldin
Carol Bellamy
Andrew J. Stein
Stanley Simon
Howard Golden
Donald R. Manes
Anthony R. Gaeta
Constituting the Members of the Board of Estimate of the City of New York

City of New York

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* In accordance with Rule 28.1, the Church of St. Paul and St. Andrew, Petitioner here, states that it is a corporation which has no parent companies, subsidiaries or affiliates to list.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. LANDMARK DESIGNATION IMPOSES IMMEDIATE AND IRREPARABLE HARM UPON AN OBJECTING CHURCH OR SYNAGOGUE	8
II. THE BURDENS PLACED UPON AN OBJECTING CHURCH OR SYNAGOGUE BY DESIGNATION AS A LANDMARK ARE NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: PAGE

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) ..14, 17

Adickes v. Kress, 398 U.S. 144 (1970)..... 18

Annapolis v. Anne Arundel County, 316 A.2d 807 (Md. 1974)..... 6

Bishop v. Wood, 426 U.S. 341 (1976)..... 3

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 12

Colautti v. Franklin, 439 U.S. 379 (1979)..... 10

Doe v. Bolton, 410 U.S. 179 (1973)..... 10

First Presbyterian Church v. City Council of York, 360 A.2d 257 (Pa. 1976)..... 6

Heritage Hill Association v. Grand Rapids, 211 N.W.2d 77 (Mich. App. 1973)..... 6

Lafayette Park Baptist Church v. Board of Adjustment, 599 S.W.2d 61 (Mo. App. 1980)..... 6

Lemon v. Kurtzman, 403 U.S. 602 (1971) 17

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 15

Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978).....6, 7, 9, 12, 13, 18

Pennsylvania v. West Virginia, 262 U.S. 553 (1923).... 12

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 11

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 10

Public Utilities Commission of California v. United States, 355 U.S. 534 (1958).....14, 15

PAGE

San Antonio Conservation Society v. San Antonio, 455 S.W.2d 743 (Tex. 1970) 6

Sherbert v. Verner, 374 U.S. 398 (1963) 18

State v. Seattle, 615 P.2d 461 (Wash. 1980) 6

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. ____, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) 14

Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968) 6

Walz v. Tax Commission, 397 U.S. 664 (1970) 17

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 18

Williamson County Regional Planning Comm. v. Hamilton Bank, 473 U.S. ____, 105 S.Ct. 3108 (1985) 14, 16, 17

Wisconsin v. Yoder, 406 U.S. 205 (1972) 18

Constitutional Provisions:

United States Constitution:

Amendment I ..... *passim*
Amendment V .....i, 2, 5, 12, 18
Amendment XIV .....i, 2, 5, 12

Statutes:

28 U.S.C. § 1257(3) 2

42 U.S.C. § 1983 5

PAGE

New York City Landmarks Preservation Law (New York City Administrative Code, Ch. 8-A, §§ 205-1.0 and 207-1.0 *et seq.*) ..... *passim*

Admin. Code:

§ 205-1.0.b 9
§ 207-4.0 4
§ 207-6.0 ..... 4, 13
§ 207-6.0.b(2) 14
§ 207-8.0 ..... 4, 13
§ 207-10.0 4
§ 207-10.0.a 9
§ 207-16.0 ..... 4, 12
§ 207-16.0.a 15
§ 207-16.0.b 9

Other Authorities:

Final Report of The Interfaith Commission to Study the Landmarking of Religious Property, The Committee of Religious Leaders of the City of New York (January 26, 1982) 7

FREY, EDWARD S., THIS BEFORE ARCHITECTURE (Jenkintown, Pa. 1963) 16

HERBERT, A.G., LITURGY AND SOCIETY (London 1956) 9

Landmarking: Ministry vs. Mortar, New York State Catholic Conference (April 1986) 8

OREGON SCHOOL CASES, COMPLETE RECORD (1925) 11

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KENT L. BARWICK, *et al.*,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner, Church of St. Paul and St. Andrew, respectfully prays that a Writ of Certiorari issue to review the order and opinion of the New York Court of Appeals entered in the above-entitled proceeding on June 5, 1986.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reprinted in the Appendix hereto, p. 1a, and is reported at 67 N.Y.2d 510. The dissenting opinion of the New York Court of Appeals is reprinted in the Appendix hereto, p. 16a, and is reported at 67 N.Y.2d, at 525. The order of the New York Supreme Court, Appellate Division, First Judicial Department, is reprinted in the Appendix hereto, p. 34a, and is reported at 110 A.D.2d 1095, 488 N.Y.S.2d 943. The opinion of the New York Supreme Court, County of New York, is reprinted in the Appendix hereto, p. 36a, and is unreported.

JURISDICTION

The petitioner brought this suit in the New York Supreme Court, County of New York. On September 17, 1984, the New York Supreme Court, County of New York, granted the respondents' motion for summary judgment and dismissed petitioner's verified amended complaint without prejudice. Appendix, p. 46a. On petitioner's appeal the New York Supreme Court, Appellate Division, First Judicial Department, on April 25, 1985, affirmed without opinion. Appendix, p. 34a. The New York Court of Appeals granted leave to appeal, and on June 5, 1986, affirmed the order of the Appellate Division. Appendix, p. 49a. The jurisdiction of this Court to review the order and judgment of the New York Court of Appeals is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

U.S. Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Constitution, Amendment XIV:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

New York City Landmarks Preservation Law (N.Y.C. Admin. Code, Ch. 8-A, § 205-1.0 and § 207-1.0, *et seq.*) is reprinted in full in the Appendix hereto, p. 51a.

STATEMENT OF THE CASE

A. Statement of Facts.[1]

The Church of St. Paul and St. Andrew, constructed in 1897, occupies a tract of land at the corner of West 86th Street and West End Avenue in New York City. A parish house is attached to the Church, and the tract is also occupied by the Church's parsonage. Over the course of time, the Church buildings have fallen into a serious state of deterioration. Though the Church was designed to seat 1400 people, its membership has fallen to 250, with a regular Sunday attendance of about 100 persons. The sanctuary balcony has been closed due to its deteriorated and unsafe condition; plumbing facilities have decayed; major repairs to exterior masonry and roof are required; leaks from the roof's drainage system are damaging the interior of the building. Heating, insurance and emergency repair expenses alone consumed 70% of the donations received by the Church in 1982. Estimates of the necessary repair costs, acquired in 1982, indicated that it would cost $350,000.00 to merely effectuate repairs, a sum far beyond the financial capacity of the Church to meet.

Faced with the reality that the congregation was occupying an unsafe, decaying, and oversized structure, the congregation, with the advice of architects and other professionals, determined that its continued existence could only be guaranteed if the present Church structure were replaced, and a reliable source of income found. The Church planned to virtually demolish the present structure, and to construct a safer, more efficient and economical Church building, appropriate to the religious needs of the congregation. Along with reconstruction of the Church, the congregation was prepared to use part of its

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1 Because this petition arises from the granting of a summary judgment, the facts, including any inferences therefrom, placed in evidence by the Church of St. Paul and St. Andrew (the party opposing summary judgment) must be treated as true. *Bishop v. Wood*, 426 U.S. 341, 347 n. 11 (1976).

property to construct an income-producing apartment building. Any income from the apartment building would be used solely for the support of the Church and its various ministries.

Before the Church could begin to execute this plan, the New York City Landmarks Preservation Commission designated the Church a landmark under the New York City Landmarks Preservation Law[2] (over the Church's vigorous objection), finding the Church to be an example of 19th century architectural "eclecticism". Appendix, p. 1a. This designation was approved by the New York City Board of Estimate on March 18, 1982.

Designation as a landmark subjected the Church to an obligation, enforceable by criminal penalties, to maintain its property in good repair. Admin. Code §§ 207-10.0 and 207-16.0. Inasmuch as the congregation is unable to meet the costs of its obligation of repair under the Landmarks Law, designation of the Church as a landmark will inevitably result in the congregation's being forced to cease its religious activities. Appendix, p. 92a.

The Landmarks Law further obliges the Church to seek the permission of the Landmarks Preservation Commission prior to altering the Church structure in any way. Admin. Code § 207-4.0. Under the Law, the Church would be required to obtain the Commission's determination that any proposed alteration is architecturally appropriate. Admin. Code § 207-6.0. Alternatively, under a procedure designed to deal with "insufficient return" from its property, the Church would be required to demonstrate to the Commission's satisfaction that its house of worship had ceased to be "adequate, suitable or appropriate" for the Church's religious purposes, whereupon the Commission is authorized to either force the sale or lease of the Church to a party of the Commission's choosing, or to acquire the Church by condemnation. Admin. Code § 207-8.0.

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2 N.Y.C. Admin. Code, Ch. 8-A, §§ 205-1.0 and 207-1.0, *et seq.* (hereinafter referred to as the "Landmarks Law", and cited as "Admin. Code § ____").

B. Course of Proceedings.

Shortly after the approval of the designation of the Church as a landmark by the New York City Board of Estimate, the Church initiated this action in the New York State Supreme Court, County of New York, seeking declaratory and injunctive relief, as well as damages, on the ground that the New York City Landmarks Preservation Law was unconstitutional as applied to the Church. The action was brought under 42 U.S.C. § 1983, and charged, *inter alia*, violation of religious freedoms protected by the First Amendment to the United States Constitution, and a "taking" of the Church's property, in violation of its right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. The Church claimed, in its complaint, that application of the Law threatened its very ability to survive as a congregation, and appropriated its freedom to determine the use of its property according to the religious needs of the congregation, rather than in accordance with the aesthetic prescriptions of the Landmarks Commission. Appendix, pp. 91a-95a.

The City agencies named as defendants in the complaint moved for summary judgment in the New York Supreme Court, charging that the Church's claims were not ripe for adjudication. The Supreme Court granted the motion for summary judgment, and its decision was affirmed by the Supreme Court's Appellate Division, without opinion, and by the New York Court of Appeals. The Court of Appeals decision, authored by a majority of four justices over the dissent of the three remaining justices, held that the Church's constitutional claims were not ripe.

REASONS FOR GRANTING THE WRIT

This is a case of first impression nationally. While all fifty states and more than 500 municipalities have enacted laws for the preservation of "landmarks" (buildings with historic or aesthetic importance) (*Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 107 (1978)), this Court has never been presented the question of whether a "landmark" law may be constitutionally applied to objecting churches, where to do so would immediately subject houses of worship to limitations and controls seriously impinging upon the exercise of their ministries. The New York City Landmarks Preservation Law is a statute necessarily having that effect. The present case further puts squarely into focus a broader constitutional question never ruled upon by this Court. Tested by this Petition is whether the preservation of the historic liberties enshrined in the Religion Clauses of the First Amendment constitutes a fundamental interest of greater magnitude than societal considerations of aesthetic or cultural interests as stated in the Landmarks Law's purpose clause. Section 205-1.0.b.

The issues presented by this case are of significance nationally due not only to the prevalence of "landmark" laws, but also to the fact that litigations respecting application of such statutes to non-commercial properties, including properties required by religious bodies for the operation or existence of their missions, have taken place in many states.[3] Perhaps nowhere in the nation has this conflict been more intensive (or more clearly representative of the competing interests at stake)

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3 *Annapolis v. Anne Arundel County*, 316 A.2d 807 (Md. 1974); *Heritage Hill Association v. Grand Rapids*, 211 N.W.2d 77 (Mich. App. 1973); *Lafayette Park Baptist Church v. Board of Adjustment*, 599 S.W.2d 61 (Mo. App. 1980); *Trustees of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (N.Y. App. Div. 1968); *First Presbyterian Church v. City Council of York*, 360 A.2d 257 (Pa. 1976); *San Antonio Conservation Society v. San Antonio*, 455 S.W.2d 743 (Tex. 1970); *State v. Seattle*, 615 P.2d 461 (Wash. 1980).

than in New York City, " 'a world-wide tourist center and world capital of business, culture and government' " (*Penn Central*, 438 U.S. at 109). Undoubtedly, in the assemblage of neighborhoods and communities within its five boroughs, New York is a microcosm of large municipalities in the United States. It is a city wherein are congregated the faithful of many religious bodies.

New York City adopted its Landmarks Law in 1965. Moving gradually about its work, the Landmarks Preservation Commission, unrestrained by any statutory exemption protecting objecting churches, pursued its roving commission to designate churches, synagogues and other religious properties as "landmarks". On May 20, 1981, New York City's religious community responded with a vigorous protest. This was followed on January 26, 1982, by the *Final Report of the Interfaith Commission to Study the Landmarking of Religious Property*, a copy of which is reprinted in the Appendix hereto.[4] Appendix, p. 124a; for a discussion by The Interfaith Commission regarding the Church of St. Paul and St. Andrew, *see*, pp. 132a-133a, 136a-137a.

From this report, and from the affidavits filed on behalf of the Church of St. Paul and St. Andrew (Appendix, pp. 100a-123a), it is apparent that the protest of the New York City

4 "In September, 1980, representatives of two small congregations on Manhattan's Upper West Side appealed to the religious leaders of the City. These two congregations had learned that their property was the subject of hearings before the Landmarks Preservation Commission and each recognized the potentially disastrous impact of a landmark designation. The Committee of Religious Leaders, representing officially the Roman Catholic, Protestant, Orthodox and Jewish Communities of the City of New York, appointed this Interfaith Commission to Study the Landmarking of Religious Property." *Final Report of the Interfaith Commission to Study the Landmarking of Religious Property*, The Committee of Religious Leaders of the City of New York (January 26, 1982). Appendix, p. 128a. It is scarcely an exaggeration to describe the response as that of "New York City's religious community". The Committee embraced the Roman Catholic Archdiocese of New York and Diocese of Brooklyn, the (Protestant and Orthodox) Council of Churches of the City of New York, the Queens Federation of Churches, and the New York Board of Rabbis, and spoke of itself as "Officially representing Roman Catholic, Protestant, Orthodox and Jewish Communities of the City of New York". Appendix, p. 125a.

religious community against imposition of landmarking on objecting churches and synagogues was not only profound, but was (and is) intensively maintained. *See*, Appendix, p. 156a, *Landmarking: Ministry vs. Mortar*, Statement of New York State Catholic Conference (April 1986). That protest found focus in the complaint filed in the present case. Appendix, p. 88a.

The Court of Appeals, affirming a grant of summary judgment against the Church, has decided substantial federal questions in conflict with applicable decisions of this Court. That conflict appears in bold relief when the application of the Landmark Law to objecting churches and synagogues is examined and, against this, the Free Exercise holdings of this Court are juxtaposed.

I. LANDMARK DESIGNATION IMPOSES IMMEDIATE AND IRREPARABLE HARM UPON AN OBJECTING CHURCH OR SYNAGOGUE.

The Church congregation which is the petitioner here does not come before the Court as any sort of "landmark", or even (in the language of the Landmarks Commission as) a " 'brilliant exemplar of the eclecticism that spread throughout American architecture in the 19th century representing a fusion of Early Christian, German Romanesque and Italian Renaissance styles." Appendix, p. 1a. Indeed, the Church does not come before the Court simply as a religious edifice. It is here as a religious organism, an indispensable part of which is its consecrated house of worship, its religiously dedicated sacred premises:

> "But you cannot sum up as merely the home of a religious movement the building where baptisms, weddings, and funerals are celebrated—not to speak of the rest. It is the home of the people, the house of God. It speaks of a real and permanent relation of God with men. It witnesses to a truth deeper and greater than the truth of human beliefs

> and ideas—the truth of that which underlies man's own existence, the Source and Ground of all Being."

A.G. HERBERT, LITURGY AND SOCIETY 41 (London 1956).

The Landmarks Law requires, as a matter of "public necessity" (§ 205-1.0.b), that the Commission legally transform a house of worship into a "landmark" if it falls within the Law's completely secular definition thereof. From the moment of designation forward, the free use of the Church edifice for the religious purposes for which solely it exists is not only curtailed, in several vital and perhaps crucial aspects, it is subject to the jurisdiction and ongoing control of a government commission.[5]

A. The Obligation to Repair

Immediately upon designation, the Church's pastor (and any other person said to be "in charge of" the Church edifice) faces monetary fines and imprisonment (Section 207-16.0.b) for failure to "keep in good repair (1) *all* of the exterior portions of [the Church] and (2) *all* interior portions thereof which, if not so maintained, *may cause or tend to cause* the exterior portions of [the Church] to deteriorate, decay or become damaged, or otherwise to fall into a state of disrepair." Section 207-10.0.a (emphasis added). The uncontested facts as presented in the affidavits of the Church's pastor, its Chairman of

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5 The Church does not here challenge the legitimacy of various building and land use laws pertaining to churches, and has not questioned the New York City zoning laws which apply to it. Zoning restrictions further an important government interest in prohibiting noxious, offensive or otherwise undesirable uses of property in a given locale. Moreover, under landmark restrictions, as contrasted against zoning requirements, "the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic-landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark at his own expense*". *Penn Central*, 438 U.S. at 140 (Rehnquist, J., dissenting) (emphasis in original).

the Board of Trustees, and its former pastor, establish that the congregation does not have the present financial wherewithal to repair the building on a day-to-day basis (Appendix, p. 105a), and that the Church has already had to cut back on its religious ministries merely to "avoid bankruptcy". Appendix, p. 102a.

It cannot be gainsaid that criminal statutes are meant to induce compliance in those persons clearly intended to be subject thereto. The designation of the Church of St. Paul and St. Andrew as a landmark is a completed act. The criminal prohibitions of the statute are thus in full force and effect with respect to it. The Church was, from the moment of designation, faced with an immediate Hobson's choice: it could seek to meet the terms of the statutory repair obligation (and therefore lose the financial ability to retain its house of worship); or its ministers and leaders could risk criminal prosecution for the sake of having the congregation retain a place of worship which is not repaired to the aesthetic satisfaction of the prosecutorial agency charged with enforcing the criminal sanctions of the Landmarks Law. It is immaterial to the question, whether the statute exerts a presently coercive effect upon the Church, that no prosecution has to date been brought. Criminal statutes are not mere suggestions—they are commands by government and obedience thereto is expected.

There was, thus, clearly a controversy ripe for adjudication between the Church and the Landmarks Commission brought on by the very fact of the Church's designation as a landmark, and the bringing to bear upon the Church of the statutory obligation to repair its decaying facility. *See*, *Colautti v. Franklin*, 439 U.S. 379, 383 n. 3 (1979); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976). In these three cases, this Court found that the lack of an imminent direct threat of prosecution was no bar to a challenge by physicians to statutory restrictions on their performance of abortions. If the applicability of a criminal statute gave rise to a justiciable controversy for those who wished to perform abortions in

violation thereof, there certainly can be no doubt that the case of a Church congregation which wishes to retain its property for the purpose of freely exercising its fundamental religious freedoms, or, alternatively, to keep its leaders out of prison, presents a ripe controversy.

This Court has found litigation to be ripe for adjudication in other instances where proof of irreparable injury has been established even though the threat of enforcement of the challenged statute is not immediate. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), Oregon had adopted a Compulsory Education Act on November 7, 1922, to be effective September 1, 1926. The case was decided by the Supreme Court June 1, 1925, approximately 14 months before the statute was to become effective. The *Pierce* plaintiffs were a religious society with religious schools in Oregon and a secular private academy. The Compulsory Education Act was directed against parents and could not have been enforced against those plaintiffs (or against anyone) until its effective date. The plaintiffs, alleging harm to their schools and parents, sought injunctive relief. The State contended that the suits were "prematurely brought". OREGON SCHOOL CASES, COMPLETE RECORD 140 (1925). The Court rejected that contention saying:

> "The suits were not premature. The injury to appellees was present and very real,—not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity."

Pierce, 268 U.S. at 536.

Pierce is plainly on point. Moreover, the present case shows even more compelling reasons for judicial determination below. In *Pierce*, no enforcement of the statute was in actual progress; therefore, it constituted no part of the injury to the plaintiffs. Instead, the injury—as here—was caused simply by the existence of the statute and the promise that it would be

enforced against the schools. Many other decisions of the Supreme Court have held that a justiciable controversy exists where there is proof of a threat of irreparable harm, even though enforcement proceedings have not been instituted or threatened or are contingent. *See*, e.g., *Pennsylvania v. West Virginia*, 262 U.S. 553, 594-595 (1923); *Carter v. Carter Coal Co.*, 298 U.S. 238, 287-288 (1936).

The Court of Appeals verges unreality when it says that "nothing in the record suggests that imposition of criminal sanctions has been threatened or even intimated." Appendix, p. 13a. Section 207-16.0 does more than suggest or intimate criminal sanctions; it *requires* them.

The burden of the statutory repair obligation was and is severe, and seriously infringes the Church's religious liberties. Compliance with the statute diverts what little financial means the Church possesses directly away from the religious uses to which they would be put, and forces their use so as to enhance the "civic pride" and "quality of life" of New York City and its "tourists and visitors". *Penn Central*, 438 U.S. at 108-109 (1978).[6]

B. Restriction On Modification or Alteration of the Church

Again from the moment of designation as a landmark, the Church could take no steps to pull itself into a position of stabilizing its currently precarious position, or making any provision for its continued ability to exist, without first receiving the approval of the Landmarks Commission. In the present case this meant that the Church, from November 24, 1981 on, was (in the face of criminal penalties) forced to shelve its plan,

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6 The overwhelming cost involved in repairing the Church amounts to an outright denial to the Church of the "present use" of its house of worship, thus constituting a taking for purposes of the Fifth and Fourteenth Amendments. *Penn Central*, 438 U.S. at 136. The Church has no steady source of income (unlike Grand Central Terminal in the *Penn Central* case), but must rely entirely on the free-will offerings of its small membership. These offerings are incontestably too meager to meet the present cost of repair.

founded upon the urgent religious needs of its congregation, to reconstruct its decaying and disintegrating structure.

The Court of Appeals' contention that this case was not ripe for present adjudication rests upon the notion that, once the Church was transformed into a "landmark", it failed to avail itself of avenues of administrative relief open to it under the Landmarks Law. Appendix, pp. 9a-10a. The court speculates that had the Church sought a certificate of appropriateness for its rebuilding plans, pursuant to section 207-6.0, the Commission *might* have approved a specific proposal for its alteration. Appendix, pp. 12a-13a. But, as pointed out by the minority opinion below, such statutory relief is available only in situations wherein architectural appropriateness could be demonstrated by the Church. Appendix, p. 24a. Further, as the minority opinion in the Court of Appeals pointed out (Appendix, pp. 25a-26a), the administrative "hardship" proceeding, under Section 207-8.0, offered no possibility for the relief sought by the Church of St. Paul and St. Andrew since that section does not take religious damage into account, but treats solely the reasonableness of economic return on the property.[7]

But forcing the Church to resort to either of these procedures, if not futile for the Church, is certainly not only expensive and time-consuming, but is ultimately a meaningless exercise. Immurement as a "landmark" in 1981 directly thwarted the Church's own carefully designed plan for survival, and brought it into a status of "nonconsensual servitude" (*Penn Central*, 438 U.S. at 143 (Rehnquist, J., dissenting)) to the City of New York. Any determination whatsoever by the Landmarks Commission, as to any alteration of the Church, would necessarily involve the Commission in considerations of the "public interest in the maintenance of the structure." *Penn Central*, 438 U.S. at 112. But any such consideration inescapably subordinates free religious use by a

7 Such *commercial* hardship may then be remedied by the Commission's trying to produce a buyer or lessee who can profitably utilize the premises without alteration or demolition or, if this proves unavailable, by condemation. Section 207-8.0.

Church of its scared place of worship to "aesthetic, historical and architectural values." Section 207-6.0.b(2).

The Court of Appeals' application herein of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. ____, 105 S.Ct. 3108 (1985), and other decisions of the Supreme Court on ripeness is plain error. The case was, and is, ripe for adjudication. Here there was no possibility that the court would entangle itself in "abstract disagreements over administrative policies" or engage in "judicial interference" with administrative proceedings. *Abbott*, 387 U.S. at 148-149. This litigation did not await the formalizing of an administrative decision. It had nothing to do with any administrative decision. If the Church had no objections to being "landmarked" *in se*, but was contending solely that it had been improperly landmarked, or that its rebuilding would have "no effect on protected architectural features", or that its proposed construction would be "appropriate" for the purposes of the Landmarks Law, or that it would suffer insufficient return, the case might be unripe in that, at the conclusion of all administrative procedures it might be that relief allowed by the Landmarks Law would be granted. Here, however, the Church has rejected being "landmarked" and has not taken the first forbidden "ameliorative" step acknowledging that it may be.

Similar to the marketing firms involved in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. ____, 105 S. Ct. 3325, 87 L.Ed.2d 409 (1985), the Church is claiming that the injury to its constitutionally protected freedoms, caused by the landmarking process, is not a function of whether the Commission will or will not approve any rebuilding plan the Church may propose, but of the Commission's "authority to adjudicate" the matter at all. *Id.*, 87 L.Ed.2d at 419.

The Church's position is likewise similar to that of the United States in its challenge to the rate-approval authority of a state commission in *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958). There, in rejecting a contention that adjudication of the United States' constitu-

tional challenges to the California statute must await the outcome of administrative rate approval hearings (which could conceivably have resulted in an administrative decision favorable to the United States' position), this Court stated:

> "We know the statute applies to shipments of the United States. We know that it is unlawful to ship at reduced rates unless the Commission approves those rates. The question is whether the United States can be subjected to the discretionary authority of a state agency for the terms on which, by grace, it can make arrangements for services to be rendered it. That issue is a constitutional one that the Commission can hardly be expected to entertain. If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right."

Public Utilities Commission, 355 U.S. at 539-40. Though the Court, in *Public Utilities Commission*, did not employ the term "ripeness" to describe the issue there involved, the Court's statements are apposite to the Church's situation: it knows the statutory requirement applies; it knows that it is a criminal act to demolish and rebuild its house of worship except "by grace" of the Landmarks Commission (Section 207-16.0.a); and it challenges the very right of the Commission to exert this form of "prior restraint" over its fundamental religious liberties. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 556-9 (1976).

Should the Church be forced to submit any rebuilding plans for the prior approval of the Commission, there could be but one of two outcomes: (a) the Church will be permitted to pursue its plans, without change; or (b) the Church will be denied the freedom to make provision for its own religious needs in the manner it deems best fitted thereto. But if the

Church is correct in its claim that the Commission is constitutionally prohibited from encroaching in any way on its freedom to use its sacred premises, then the Commission lacks all power to disapprove the Church's plans, and Commission review is a useless, intrusive, wasteful, confiscatorially expensive exercise. Completely alien to the Commission's consideration of "architectural values" in such a proceeding is the *primary* force and consideration for the Church—the fidelity of its house of worship to the Church's religious mission to witness to, and give expression to, the reality of its Faith:

> "Our buildings must bristle with belief or they fail to advance the Christian witness . . . .
>
> . . . .
>
> "What we believe about God and man under God and about God's mighty act in His Son in our behalf and our faithful response in worship, work, and obedience are the beliefs that must motivate our planning and shape our buildings . . . . But it all begins with what we believe about God's deed for us in Christ, and the nature and the business of the church, or we build in vain.
>
> ". . . There is a difference between the Church and everything else on earth and this difference must be clearly celebrated and announced by every means we have."

EDWARD S. FREY, THIS BEFORE ARCHITECTURE 88-89 (Jenkintown, Pa. 1963).

The Court of Appeals similarly errs in its application of *Williamson County, supra*. There, adjudication of the claim of a landowner for compensation due to an alleged "taking" under a zoning ordinance was held premature because the owner had not obtained a final administrative decision, having failed to file applications for variances. Further, he had not gone through available state procedures for just compensation. In the present case, by contrast, the administrative action for which court review was sought was "final". The Church could not obtain relief *from* the statute *under* the statute. The

Church did not attack the facial validity of the Landmarks Law in all of its possible applications, but, as the Court of Appeals so well stated:

> "[I]t is evident that at the root of plaintiff's claim of injury is its aversion to ceding any control of [its] building program to the Commission—not its concern over ultimate approval of the program by the Commission."

Appendix, pp. 5a-6a. Or, put in the words of the Church's brief below, as quoted by the Court of Appeals:

> "The dispute in this case is not whether this decaying church structure is architecturally significant. Instead, the dispute is whether—after appellant has shown that its extreme financial and physical hardship blocks its fulfillment of its religious and charitable purposes—*the Church must then surrender control over rebuilding to the Landmarks Preservation Commission in order for the Church to survive—in effect, to buy its survival by giving over to the Commission control of the new structure*." (Reference omitted.) (Emphasis supplied by the court.)

Appendix, p. 6a. This, under *Williamson County* and *Abbott*, is surely a strictly "legal issue".

While the issue of whether the Landmarks Law creates excessive entanglements between government and churches was not specifically raised below as a separately cognizable violation of the Establishment Clause, it is apparent that the statute indeed requires "sustained and detailed administrative relationships for enforcement of statutory or administrative standards". *Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971); *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). The regulatory relationship entailed in any Commission oversight of the Church's rebuilding plans will necessarily involve the Commission in consideration of the religious priorities and needs of the Church, a role fraught with the potential for "confrontations and conflicts" over matters of religious domain. *Walz*, 397 U.S. at 674. That entangling relationship envelopes and restricts the Church's freedom to exercise its religious liberty.

II. THE BURDENS PLACED UPON AN OBJECTING CHURCH OR SYNAGOGUE BY DESIGNATION AS A LANDMARK ARE NOT JUSTIFIED BY ANY COMPELLING STATE INTEREST.

The error of the Court of Appeals in holding an adjudication on the merits premature is compounded by the fact that decisions of the Supreme Court dictate the conclusion that imposition of the Landmarks Law on objecting churches and synagogues is violative of their liberties protected by the Free Exercise Clause. Even though the Church of St. Paul and St. Andrew was denied a trial in this constitutionally significant case (*see, Adickes v. Kress*, 398 U.S. 144, 160-161 (1970)), nothing could be more evident than that no compelling state interest is imaginable in the subjecting of active houses of worship to a statute encasing them in governmental judgments according to broad and highly subjective aesthetic and "historical" criteria.

Judgments of this Court on the Free Exercise of religion have recognized that exercise for what it is—a highly protected, fundamental freedom. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943); *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). No ordinary "public interest" removes the exercise of religion from its place among First Amendment freedoms:

> "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'."

Sherbert v. Verner, 374 U.S. 398, 406 (1963).

While the Court has held that imposition of the Landmarks Law on commercial enterprises does not, in given circumstances, constitute a "taking" within the meaning of the Fifth Amendment (*Penn Central, supra*), it should hardly require

argument to establish that houses of worship are of an utterly different character constitutionally. Three dissenting Justices of the Court of Appeals stated the matter precisely:

> "As the church contends, the basic issue confronting the court is which is to be preferred—religious freedom or the exercise of the police power in furtherance of architectural and cultural interests."

Appendix, p. 16a. It could scarcely be said that the subordinating of a Church's free religious use of its house of worship to a highly subjective aesthetic or cultural regime is absolutely essential to the curbing of the "gravest abuses, endangering paramount interests."

Permitting the congregation of the Church of St. Paul and St. Andrew to take the steps needed to survive as a Church, without the secular control of the Landmarks Commission, will not harm the public health, safety or morals in any way. Nor would it have any negative effect whatsoever upon New York's tourist trade, civic pride or economy. That religious freedom could thrive in New York would be of infinitely greater value to that City's religious community, and to the City itself.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges that this Petition be granted.

Respectfully submitted,

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